MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

VOTER ID LAW'S CONSTITUTIONALITY TO BE ARGUED BEFORE MICHIGAN SUPREME COURT NEXT WEEK

LANSING, MI, November 9, 2006 – Is Michigan's voter identification statute unconstitutional? That is among the questions that the Michigan Supreme Court will consider in oral arguments next week.

In re Advisory Opinion 2005 PA 71 concerns Section 523 of 2005 Public Act (PA) 71, which is scheduled to take effect on January 1, 2007. Section 523 requires voters to provide an official state identification card, a driver's license, or "other generally recognized picture identification card" in order to vote; voters who lack photo identification must "sign an affidavit to that effect" in order to vote. In February, the Michigan House of Representatives issued a resolution asking the Supreme Court for an advisory opinion on the statute's constitutionality. In 1997, then-Michigan Attorney General Frank J. Kelley issued an opinion that a similar 1996 statute violated the Fourteenth Amendment of the U.S. Constitution.

Also before the Court is *McDowell v City of Detroit*, which involves the fire-related deaths of six children at a Detroit housing complex apartment. The fire was apparently caused by an electrical defect in the wall space; the plaintiff argues that the fire amounted to a trespass because it was a physical intrusion that was set in motion by the city or its agents. Both the trial court and the Court of Appeals allowed this trespass-nuisance claim to go forward; the city and the housing commission contend that governmental immunity bars the claim. Similarly, in *Wolf v City of Ferndale*, the city argues that governmental immunity blocks the plaintiffs' claim that the city wrongfully interfered with the plaintiffs' business deal with a third party.

Greater Bible Way Temple of Jackson v City of Jackson presents a dispute over a zoning issue. The church claims that the city's refusal to rezone church-owned land – which the church plans to use for a multiple-unit assisted living center – interferes with the church's exercise of religion. Both the trial court and Michigan Court of Appeals have agreed that the city and other defendants violated the federal Religious Land Use and Institutionalized Persons Act, and that the defendants in this case failed to show a compelling government interest in maintaining the single-family zoning on the church property.

The remaining cases feature criminal, eminent domain, procedural, medical malpractice, and tax issues.

Court will be held on **November 13, 14, and 15**, starting at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Monday, November 13
Morning Session

IN RE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71 (case no. 130589)
Attorney for Attorney General in Support of Constitutionality of 2005 PA 71: Heather S. Meingast/(517) 373-1124
Attorney for Attorney General in Opposition of Constitutionality of 2005 PA 71: Ron D. Robinson/(313) 456-0200
Attorney for amicus curiae Governor Jennifer M. Granholm: Kelly G. Keenan/(517) 373-3400
Attorney for amicus curiae Frank J. Kelley, Attorney General Emeritus: Frank J. Kelley/(517) 371-1400
Attorney for amicus curiae Michigan House of Representatives: Jeffrey V. Stuckey/(517) 371-1730
Attorney for amicus curiae Michigan Republican Party: Eric E. Doster/(517) 371-8241
Attorney for amicus curiae Michigan Democratic Party, Michigan House Democratic Caucus, Michigan Senate Democratic Caucus, and Michigan Legislative Black Caucus: Andrew Nickelhoff/(313) 496-9429
Attorney for amicus curiae Michigan House Democratic Caucus: Sheila C. Cummings/(517) 373-5900
Attorney for amicus curiae Michigan Department of State, Bureau of Elections: Patrick J. O'Brien/(517) 373-6434
Attorney for amicus curiae Michigan Civil Rights Commission and Michigan Department of Civil Rights: Genevieve Dwaihy Tusa/(313) 456-0200
Attorney for amicus curiae Michigan Protection & Advocacy Service, Inc.: Mark D. McWilliams/(517) 487-1755
Attorney for amicus curiae Lawyers' Committee for Civil Rights Under Law and AARP: Brian G. Shannon/(248) 351-3000
Attorney for amicus curiae American Center for Voting Rights Legislative Fund and Kevin Fobbs: Stephen K. Dexter/(816) 292-2000
Attorney for amicus curiae Michigan County Clerks, et al.: Mary Ellen Gurewitz/(313) 965-3464
Attorney for amicus curiae National Association for the Advancement of Colored People-Detroit Branch, et al.: Melvin Butch Hollowell, Jr./(313) 871-2087

At issue: The Michigan House of Representatives, by resolution, asked the Supreme Court to rule on the constitutionality of a state statute that requires voters to provide photo identification. A similar provision was enacted in 1996, but was found unconstitutional by the Attorney General in 1997. Do the photo identification requirements violate either the Michigan Constitution or the United States Constitution?

Background: Article 3, section 8 of the Michigan Constitution states that "[e]ither house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." In House Resolution No. 199, dated February 22, 2006, the Michigan House of Representatives asked the Supreme Court to issue an advisory opinion addressing the constitutionality of Section 523 of 2005 Public Act (PA) 71, which is scheduled to take effect on January 1, 2007. Section 523 requires voters to provide an official state identification card, a driver's license, or "other generally recognized picture identification card" in order to vote. That statute further provides that a voter who does not have one of these forms of identification must "sign an affidavit to that effect" before being allowed to vote. The resolution explains that, in 1996 PA 583, the Michigan Legislature first enacted a requirement that voters identify themselves at polling places by presenting photo identification. But on January 29, 1997, then-Michigan Attorney General Frank J. Kelley issued an opinion finding that 1996 PA 583 violated the Equal Protection Clause of the Fourteenth Amendment. The resolution states that "[s]ince the issuance of this opinion, neither of Michigan's Secretaries of State, nor any local election official, has enforced the photo identification requirements of MCL § 168.523 . . . ." The resolution also notes that in 2002, Congress enacted the Help America Vote Act (HAVA), 42 USC 15301 et seq., which was designed to "strengthen our elections process." In 2005 PA 71, the Michigan Legislature reenacted the MCL 168.523 photo identification requirements in response to HAVA. The Supreme Court has agreed to consider whether the photo identification requirements of Section 523, on their face, violate either the Michigan Constitution or the United States Constitution.

MCDOWELL v CITY OF DETROIT, et al. (case no. 127660)

Attorney for plaintiff Joyce McDowell, as Personal Representative of the Estates of Blake Brown, Joyce Brown, and Christopher Brown, deceased, and as Conservator for Jonathon Fish, Joanne Campbell, and Juanita Fish: Victor S. Valenti/(248) 355-5555

Attorney for defendants City of Detroit and the Detroit Housing Commission: James G. Gross/(313) 963-8200

Attorney for amicus curiae Insurance Institute of Michigan: John A. Yeager/(517) 351-6200

Attorney for amicus curiae Real Property Law Section of the State Bar of Michigan: Kenneth F. Posner/(248) 489-8600

Trial court: Wayne County Circuit Court

At issue: Is negligent nuisance an exception to governmental immunity? Does a fire that starts in the space between the inner and outer wall of a leased premises amount to a trespass when it burns the premises?

Background: Joanne Campbell leased an apartment in a Detroit public housing complex; she lived there with her three minor children, her sister Juanita Fish, and Fish's four children. A fire broke out in the apartment; six of the children died. Fish and one child escaped, but suffered burns. The fire was apparently caused by an electrical defect in the wall space that ignited insulating material; the record indicates that Housing Commission employees visited the

apartment at least twice to address electrical complaints. The plaintiff sued the city of Detroit and the Detroit Housing Commission. The amended complaint contained six counts: nuisance per se, nuisance, trespass-nuisance, breach of contract, breach of express and implied warranty of habitability and quiet enjoyment, and violation of the housing code. In particular, the plaintiff claimed that the fire amounted to a trespass because it was a physical intrusion that was set in motion by the city or its agents. The defendants moved to dismiss the case, arguing that they were protected from liability by governmental immunity. The plaintiff responded that governmental immunity did not bar the lawsuit, because the operation of the apartment complex is a proprietary function, which is a statutory exception to governmental immunity. The trial court granted the defendants' motion in part, and denied the motion in part. The trial judge held that governmental immunity did not bar the plaintiff's nuisance per se, nuisance, and trespass-nuisance claims. The trial court also held that the plaintiff could pursue her breach of contract and warranty claims. But the judge found that operating public housing is not a proprietary function, and that the defendants did not violate state housing laws. Both parties appealed. In a published opinion, the Court of Appeals held that the defendants' summary disposition motion should have been granted on all but the nuisance in fact and trespass-nuisance counts, and that the operation of the apartment complex was not a proprietary function. The defendants appeal to the Supreme Court, arguing that negligent nuisance is not an exception to governmental immunity, and that the facts of this case do not support the plaintiff's claim of trespass-nuisance.

THE GREATER BIBLE WAY TEMPLE OF JACKSON v CITY OF JACKSON, et al. (case nos. 130194, 130196)

Attorney for plaintiff The Greater Bible Way Temple of Jackson: Mark T. Koerner/(517) 886-7176

Attorneys for defendant City of Jackson: Thomas R. Schultz/(248) 851-9500, Susan G. Murphy/(517) 788-4050

Attorney for amicus curiae Michigan Municipal League Legal Defense Fund: William J. Danhof/(517) 487-2070

Attorney for amicus curiae National League of Cities: David Shelton Parkhurst/(202) 626-3000

Trial court: Jackson County Circuit Court

At issue: A church asked the city of Jackson to rezone land so the church could build an assisted-living apartment complex. The city refused, and the church sued under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits local units of government from using land use regulations to discriminate against religious entities. Is rezoning required? Is RLUIPA unconstitutional? Is the church entitled to recover its attorney fees under RLUIPA where the church did not request attorney fees until after the judgment was entered?

Background: The Greater Bible Way Temple of Jackson provides a day care center, services to persons with disabilities, sports programs for disadvantaged youths, and a kitchen which serves community residents and the underprivileged. The church complex is located on land zoned for multiple-family housing. Over several years, the church acquired property directly across from its main sanctuary, in a neighborhood zoned for single-family residences. The church planned to build a four-building, 32-unit assisted-living center for elderly and disabled people on this property. The Jackson City Council denied the church's request to rezone the property. The church sued the city, the Jackson Planning Commission, and the city council, claiming that the defendants violated the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).

The city's refusal to rezone the property imposed a substantial burden on its exercise of its religious mission, the church argued. The trial judge ruled in the church's favor, holding that RLUIPA applied to the city's zoning decision; the judge further held that the defendants could not demonstrate a compelling governmental interest in maintaining the single-family zoning on the property. Accordingly, the church was entitled to the requested zoning change, the judge ruled. The trial judge also ruled that the church could recover its attorney fees. The Court of Appeals affirmed the trial court's rulings in a published opinion, and also ruled that RLUIPA was not unconstitutional. The defendants appeal.

Afternoon Session

STAMPLIS v ST. JOHN HEALTH SYSTEM, et al. (case nos. 126980, 127032)
Attorney for plaintiffs Joseph Stamplis and Theodora Stamplis: Victor S. Valenti/(248) 355-5555
Attorney for defendant St. John Health System, d/b/a River District Hospital: Susan Healy Zitterman/(313) 965-7905
Attorney for defendant G. Phillip Douglass, D.O.: John P. Jacobs/(313) 965-1900
Attorney for amicus curiae Michigan Trial Lawyers Association: Larry W. Bennett/(248) 457-7037
Trial court: St. Clair County Circuit Court
At issue: In a medical malpractice case, does the dismissal with prejudice of the plaintiffs' claim against the defendant physician require dismissal of the plaintiffs' vicarious liability claim against the hospital?
Background: Joseph and Theodora Stamplis sued Dr. G. Phillip Douglass for medical malpractice; they also sued River District Hospital, where Douglass was an emergency room physician. They claimed that Douglass failed to timely diagnose Joseph Stamplis' epidural abscess. As a result of the defendants' negligence, Mr. Stamplis became paraplegic, the plaintiffs contended. On the day of trial, the plaintiffs' counsel and Douglass' counsel agreed on the record that all claims against Douglass would be dismissed. The parties made clear that the dismissal was to be "with prejudice" and that no further claims could be filed against Douglass. When the agreement was being described to the trial judge, the plaintiffs' attorney stated that he did not intend to give up the plaintiffs' claim that the other defendant, River District Hospital, was vicariously liable for Douglass' alleged negligence. The trial court entered a written order stating that the lawsuit against Douglass was dismissed with prejudice. The next day, the River District Hospital filed a motion for summary disposition, arguing that the plaintiffs' agreement to dismiss their claim against Douglass, the hospital's agent, meant that the plaintiffs' vicarious liability claim against the hospital also had to be dismissed. The trial court agreed and entered an order dismissing the hospital from the case. A divided Court of Appeals reversed, vacating both trial court orders in an unpublished per curiam opinion. The defendants appeal, seeking reinstatement of both trial court orders. Alternatively, Douglass asks the Supreme Court to reinstate the stipulated order dismissing him from the case.

CARRIER CREEK DRAINAGE DISTRICT v LAND ONE, L.L.C., et al. (case nos. 130125-7)
Attorney for plaintiff Carrier Creek Drainage District: Michael G. Woodworth/(517) 886-7176

Attorneys for defendants Land One, L.L.C. and Echo 45, L.L.C.: Graham K. Crabtree/(517) 482-5800, William D. Tomblin/(517) 349-8000
Attorney for amicus curiae Real Property Law Section of the State Bar of Michigan: Jerome P. Pesick/(248) 646-0888
Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890
Trial court: Eaton County Circuit Court
At issue: In this eminent domain action, the defendant landowners claimed additional compensation for the condemned property, based on the possibility that the property might be rezoned. The drain district argued that this possibility-of-rezoning claim was not timely filed under MCL 213.55(3), which requires landowners to file a written claim for any additional compensation sought within 90 days of receiving a good faith offer for their land, or within 60 days of the date that a condemnation lawsuit is filed. The statute states that, if such a written claim is not filed, the claim is barred. Does MCL 213.55(3)'s written notice requirement apply to a possibility-of-rezoning claim?
Background: Carrier Creek Drainage District sought to buy certain properties in Eaton County for a drain improvement project, but the two corporate landowners, Land One, L.L.C. and Echo 45, L.L.C., rejected Carrier Creek's good-faith offers. Carrier Creek then filed three eminent domain lawsuits against the landowners, which are companies owned by the same real estate developer. Carrier Creek sought to have the properties condemned for the project, but the landowners claimed that they were entitled to additional compensation for the condemned property because the property might be rezoned. Carrier Creek argued that this possibility-of-rezoning claim was not timely filed under MCL 213.55(3). That statute requires landowners to file a written claim for any additional compensation sought within 90 days of receiving a good-faith offer for their land, or within 60 days of the date that a condemnation lawsuit is filed. The statute states that, if such a written claim is not filed, the claim is barred. The trial court agreed with Carrier Creek that MCL 213.55(3) applied, and excluded the possibility-of-rezoning claim because of the landowners' failure to comply with the statute's notice requirement. The Court of Appeals affirmed in a published opinion. The court reviewed the legal authority regarding possibility-of-rezoning claims and observed that, "because the possibility of rezoning affects the price that a willing buyer would have offered for the property prior to the taking, it is compensable if proved." It is therefore, the court concluded, a claim for "compensable damage" that was required to be disclosed within the time limits set forth in MCL 213.55(3). The landowners appeal.

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST v CITY OF FERNDALE, et al. (case no. 130748)
Attorney for plaintiffs Laurence G. Wolf Capital Management Trust and Laurence G. Wolf, as trustee and individually: Timothy O. McMahon/(248) 554-6300
Attorney for defendants City of Ferndale, Marsha Scheer, Robert G. Porter, and Thomas W. Barwin: Joseph Nimako/(734) 261-2400
Attorney for amicus curiae Attorney General: Ann M. Sherman/(517) 373-6434
Attorney for amicus curiae Michigan Municipal League, Michigan Townships Association, and the Michigan Municipal Risk Management Authority: Marcia L. Howe/(248) 489-4100
Trial court: Oakland County Circuit Court
At issue: The city of Ferndale denied the plaintiffs' request for a zoning variance to erect a

communications antenna on the plaintiffs' property. Later, the city entered into an agreement with the plaintiffs' potential customer to construct such an antenna. Does the plaintiffs' claim for intentional interference with a business relationship fall within the exception to governmental immunity for proprietary functions (MCL 691.1413)? Or is the plaintiffs' claim barred by governmental immunity?

Background: Laurence Wolf, through the Laurence G. Wolf Capital Management Trust, owns a commercial building at the corner of Nine Mile and Woodward Avenue in Ferndale. Wolf and the trust (collectively "Wolf") leased space on the building's roof for a cellular communications antenna, and negotiated with AT&T to place a second antenna on the roof. The parties executed a lease agreement that placed the burden on AT&T to obtain the necessary zoning variance. AT&T attempted to do so, but the city of Ferndale denied AT&T's application for a variance. Wolf sued the city to secure the variance, but AT&T later reached an agreement with the city to erect its antenna on municipal property. After some time, and a partial victory in federal court, Wolf contacted AT&T about reviving their business deal. AT&T was interested in the deal, according to Wolf, until a city representative told AT&T that Wolf would never obtain permission for a new antenna. Wolf then applied for a special use permit, with the intent of erecting an antenna and attracting new cellular customers. Wolf voluntarily withdrew that application, and then filed this lawsuit in state court. The Wolf plaintiffs alleged that the city and other defendants tortiously interfered with their business deal with AT&T, and that the defendants tortiously interfered with the plaintiffs' prospective business relationships with other cellular service providers. The defendants filed a motion for summary disposition, arguing that governmental immunity barred the plaintiffs' claims. They argued that the "proprietary function" exception to governmental immunity in MCL 691.1413 did not apply, in part because the plaintiffs made no showing of "property damage" as required by the statutory exception. The trial court granted the defendants' motion, concluding that a claim for tortious interference was not a claim for "property damage." The Court of Appeals reversed in a published opinion, concluding that the plaintiffs' lawsuit alleged that the city's actions harmed the plaintiffs' right of lawful and unrestricted use of their property, which amounted to "property damage" within the meaning of the governmental immunity statute. The defendants appeal.

Tuesday, November 14
Morning Session

PEOPLE v APGAR (case no. 127651)
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Michael Scott Apgar: Suzanna Kostovski/(313) 965-6050
Trial court: Wayne County Circuit Court
At issue: In *People v Cornell*, 466 Mich 355 (2002), the Michigan Supreme Court held that an offense lesser than the charged offense may be considered by the fact finder only if it is a "necessarily included lesser offense" (meaning that all the elements of the lesser offense are also elements of the greater offense) that is supported by a rational view of the evidence. Under *Cornell*, "cognate lesser offenses" (those that do not include all of the elements of the charged offense, but also include an element that the charged offense does not) may not be considered. But MCL 768.32 says that the fact finder may convict a defendant of any inferior degree of an offense that consists of different degrees. Here, the defendant was charged with first-degree criminal sexual conduct (CSC), but convicted of third-degree CSC based on elements that were

not part of the first-degree CSC charges. Can instructions on cognate lesser offenses be given where the Legislature has split a class of crimes into degrees? Is the prosecution an "aggrieved party" within the meaning of MCR 7.203(A), in light of the fact that the Court of Appeals affirmed the defendant's conviction?

Background: The 13-year-old victim testified that Michael Apgar forced her to engage in sexual intercourse, threatening her with a knife-like object. The victim claimed that Apgar's friends also forced her to perform oral sex. Apgar was charged with first-degree criminal sexual conduct (CSC) under MCR 750.520b(1)(d) (perpetrator aided and abetted by one or more persons and uses force or coercion to accomplish penetration), and first-degree CSC under MCR 750.520b(1)(e) (perpetrator armed with a weapon or an object that the victim believes is a weapon). At trial, the prosecution asked for an instruction on the lesser offense of third-degree CSC under MCL 750.520d(1)(a) (victim at least 13 and under 16 years of age), based on the victim's age. The prosecution then moved to amend the information to add a charge of third-degree CSC. The trial court denied the prosecutor's request to amend the information, but it instructed the jury on third-degree CSC, over the defendant's objection. The jury convicted Apgar of that charge, and he appealed. In a divided, published opinion, the Court of Appeals affirmed. The Court of Appeals held that the third-degree CSC charge was not a necessarily included lesser offense of first-degree CSC under *People v Cornell*, because neither of the first-degree CSC charges against Apgar included an element pertaining to the victim's age. Thus, under *Cornell*, the third-degree CSC charge was a cognate lesser offense and the instruction should not have been given. Nevertheless, the appeals court concluded that any error was harmless, and it affirmed Apgar's conviction. The prosecutor appeals to the Supreme Court, arguing that this aspect of the Court of Appeals ruling is incorrect.

PEOPLE v NYX (case no. 127897)

Prosecuting attorney: Thomas M. Chambers/(313) 224-5749

Attorney for defendant Maurice Lamont Nyx: John F. Royal/(313) 962-3738

Trial court: Wayne County Circuit Court

At issue: In *People v Cornell*, 466 Mich 355 (2002), the Michigan Supreme Court held that an offense lesser than the charged offense may be considered by the fact finder only if it is a "necessarily included lesser offense" (meaning that all the elements of the lesser offense are also elements of the greater offense) that is supported by a rational view of the evidence. Under *Cornell*, "cognate lesser offenses" (those that do not include all of the elements of the charged offense, but also include an element that the charged offense does not) may not be considered. But MCL 768.32 says that the fact finder may convict a defendant of any inferior degree of an offense that consists of different degrees. Here, the defendant was charged with three counts of first-degree criminal sexual conduct (CSC), but was convicted of two counts of second-degree CSC, based on elements that were not part of the first-degree CSC charges. Can the fact finder consider and convict the defendant of cognate lesser offenses where the Legislature has split a class of crimes into degrees?

Background: Maurice Nyx, the dean of students at a charter high school, was charged with three counts of first-degree criminal sexual conduct (CSC) for alleged sexual conduct with a 15-year-old student, under MCL 750.520b(1)(b)(iii) (perpetrator who is in a position of authority over a 13-to-16-year-old victim and uses this authority to coerce the victim to submit to penetration). Nyx admitted to the police that he touched the victim's vagina, but denied that any penetration occurred. He waived his right to a jury trial, and agreed to be tried by the judge. The trial judge

did not find the victim to be entirely credible, but also found that Nyx's admission to the police corroborated a portion of the victim's account. The judge therefore convicted Nyx of two counts of second-degree CSC, MCL 750.520c(1)(b)(iii) (perpetrator who is in a position of authority over a 13-to-16-year-old victim and uses this authority to coerce the victim to submit to sexual contact). In an unpublished opinion, the Court of Appeals concluded that second-degree CSC, which requires the prosecutor to establish "sexual contact," is a cognate lesser offense of first-degree CSC, which requires the prosecutor to establish "penetration." The court explained that sexual penetration can be for any purpose, but sexual contact is defined as a touching that can "reasonably be construed as being for the purpose of sexual arousal or gratification." As a result, second-degree CSC requires proof that the defendant intended to seek sexual arousal or gratification, while first-degree CSC does not require such proof, the Court of Appeals said. It is therefore possible, the court concluded, for a defendant to commit first-degree CSC without also committing second-degree CSC, making second-degree CSC a cognate lesser offense of first-degree CSC. Accordingly, relying on *People v Cornell*, 466 Mich 335 (2002), the Court of Appeals vacated Nyx's convictions and remanded the case to the trial court for dismissal. The prosecutor appeals.

PEOPLE v SMITH (case no. 130245)
Prosecuting attorney: Thomas R. Grden/(248) 858-0656
Attorney for defendant Randy R. Smith: Robin M. Lerg/(248) 649-4777
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial court: Oakland County Circuit Court
At issue: In *People v Cornell*, 466 Mich 355 (2002), the Michigan Supreme Court held that an offense lesser than the charged offense may be considered by the fact finder only if it is a "necessarily included lesser offense" (meaning that all the elements of the lesser offense are also elements of the greater offense) that is supported by a rational view of the evidence. Under *Cornell*, "cognate lesser offenses" (those that do not include all of the elements of the charged offense, but also include an element that the charged offense does not) may not be considered. In *People v Mendoza*, 468 Mich 527 (2003), the Supreme Court held that involuntary manslaughter is a necessarily included lesser offense of murder. Does this holding extend to statutory involuntary manslaughter, which requires the intentional aiming of a firearm? If statutory manslaughter is a necessarily included lesser offense of murder, did a rational view of the evidence in this case support a conviction of statutory involuntary manslaughter? If so, was the trial court's failure to instruct the jury on statutory involuntary manslaughter harmless error?
Background: Randy Smith was arrested and charged with the fatal shooting of a young woman in his home. At Smith's trial, the judge instructed the jury to consider whether Smith was guilty of the charged offense of second-degree murder and the lesser offense of common law involuntary manslaughter. Smith asked the judge to instruct the jury that it could also consider whether he was guilty of statutory involuntary manslaughter under MCL 750.329 (a death resulting from a firearm intentionally aimed, but without malice). The trial judge refused Smith's request, concluding that statutory involuntary manslaughter is a cognate lesser offense of murder, because it contains an element (pointing a firearm) that is not also an element of second-degree murder, and that it could not be considered by the fact finder. The jury convicted Smith of second-degree murder and felony-firearm. He was sentenced to a 30-to-50-year term for the murder conviction plus a consecutive two-year term for the felony-firearm conviction. Smith

appealed to the Court of Appeals. Among the issues that he raised on appeal was an objection to the trial court's refusal to instruct the jury that it could consider whether he was guilty of the lesser offense of statutory involuntary manslaughter. In an unpublished opinion, the Court of Appeals agreed that Smith was entitled to an instruction on statutory involuntary manslaughter, although the court did not find that his other appellate issues had any merit. Consequently, the Court of Appeals vacated Smith's convictions and remanded the case for a new trial. The prosecutor appeals the Court of Appeals decision to vacate Smith's convictions, and the Supreme Court will hear oral argument on this issue. Smith also appeals from the Court of Appeals ruling, but the Supreme Court has not directed the parties to present oral argument on his application for leave to appeal as cross-appellant, which remains under consideration.

Afternoon Session

AL-SHIMMARI v THE DETROIT MEDICAL CENTER, et al. (case no. 130078)
Attorney for plaintiff Abdul Al-Shimmari: Michael S. Daoudi/(248) 352-0800
Attorney for defendants The Detroit Medical Center, Harper-Hutzel Hospital, University Neurosurgical Associates, P.C., and Setti Rengachary, M.D.: Debbie K. Taylor/(586) 447-3736
Trial court: Wayne County Circuit Court
At issue: In this medical malpractice case, the defendant physician denies that he was served with the complaint before the statute of limitations expired. After a hearing, the trial court agreed and dismissed the claims against the physician and the other defendants. Is the plaintiff entitled to a jury trial on the service of process issue? If the physician is dismissed, must the other defendants -- a hospital, clinic, and medical center -- also be dismissed? Did the defendant doctor waive the service of process issue?
Background: Dr. Setti Rengachary performed surgery on Abdul Al-Shimmari's back. Al-Shimmari sued Rengachary and the hospital, medical center, and clinic for medical malpractice. There was a question whether Rengachary personally received service of process before the statute of limitations expired. The trial court held a hearing, found that Rengachary had not been personally served within the limitations period, and dismissed the claims against him. The trial court then granted summary disposition to the remaining defendants, reasoning that the dismissal of the suit against the doctor also required dismissing the claims against the other defendants. The Court of Appeals reversed and remanded the case. In an unpublished opinion, the Court of Appeals held that Al-Shimmari was entitled to a jury trial of the factual issues surrounding service of process, and concluded that Al-Shimmari's suit against the remaining defendants should not have been dismissed solely because the suit against the doctor had been dismissed. The defendants appeal, contending that the Court of Appeals improperly reversed the trial court's ruling. Al-Shimmari also appeals, arguing that the doctor waived his ability to challenge service of process by participating in a stipulation, which amounted to a general appearance in the suit.

DAIMLERCHRYSLER CORPORATION v MICHIGAN DEPARTMENT OF TREASURY (case no. 130106)
Attorney for petitioner DaimlerChrysler Corporation: Michele L. Halloran/(517) 853-1601
Attorneys for respondent Michigan Department of Treasury: Roland Hwang, Mark A. Meyer/(517) 373-3203
Tribunal: Michigan Tax Tribunal

At issue: Petitioner DaimlerChrysler Corporation paid taxes on motor fuel delivered to its storage tank. It placed some of that fuel in cars destined for out-of-state dealerships. DaimlerChrysler then sought a refund on taxes paid on fuel placed in the cars destined for other states. Is DaimlerChrysler entitled to a refund?

Background: DaimlerChrysler Corporation places fuel in the fuel tank of each vehicle that it manufactures. The fuel is purchased at retail and DaimlerChrysler pays a motor fuel tax on it. This case concerns whether DaimlerChrysler is entitled to a refund for the motor fuel tax that it paid on fuel that is eventually placed in the tank of vehicles that are shipped out of state. DaimlerChrysler filed a claim with the Michigan Department of Treasury, seeking a refund of $319,709 in motor fuel taxes paid from April 1, 2001 to June 30, 2001. It claimed that the fuel placed in the vehicles that were to be shipped out of state was incidental to the commercial enterprise of auto manufacturing and was not consumed by DaimlerChrysler on Michigan public roads or highways. As a result, DaimlerChrysler argued, the tax should be refunded. The department denied DaimlerChrysler's request. DaimlerChrysler then filed a petition for review in the Tax Tribunal, raising the same argument that it presented to the Michigan Department of Treasury. In addition, DaimlerChrysler asserted that it was entitled to a refund under § 39 of the Motor Fuel Tax Act, which permits an "end user" to seek a refund for tax paid on "motor fuel used in an implement of husbandry or otherwise used for nonhighway purposes . . . ." The Tax Tribunal ruled against DaimlerChrysler and granted the department's motion for summary disposition. The Tax Tribunal concluded that DaimlerChrysler was not an "end user" of the motor fuel, and that DaimlerChrysler was not entitled to a refund for any other reason. The Court of Appeals affirmed in a published opinion. DaimlerChrysler appeals.

KUSMIERZ, et al. v SCHMITT, et al. (case nos. 130187, 130574)

Attorney for plaintiffs JoAnn Kusmierz, Kerry Kusmierz, Kim L. Lindebaum, and James B. Lindebaum: David R. Skinner/(989) 893-5547

Attorney for defendants Joyce Schmitt and Diane Rankin: Graham K. Crabtree/(517) 482-5800

Trial court: Bay County Circuit Court

At issue: This appeal presents a dispute over case evaluation sanctions. Did the trial court err by considering its post-trial grant of injunctive relief as a basis for awarding case evaluation sanctions? Did the Court of Appeals err by comparing the case evaluation award and jury verdict for each individual plaintiff as against each individual defendant, when the five plaintiffs were awarded a lump sum case evaluation award? Did the Court of Appeals err by finding that two of the plaintiffs are liable to a defendant for case evaluation sanctions, when that defendant never filed or served a request for costs in compliance with Michigan Court Rule (MCR) 2.403(O)(8)?

Background: The parties participated in a case evaluation under Michigan Court Rule (MCR) 2.403. That court rule provides in part that a party who rejects a case evaluation is at risk of paying the opposing party's costs unless the rejecting party receives a verdict that is more favorable than the evaluation. The case evaluators awarded the five plaintiffs a "lump sum" of $25,000, which the evaluators assessed against defendants Joyce Schmitt ($17,500) and Diane Rankin ($7,500). The evaluators found no cause of action against defendant Ronald Schmitt. Following the evaluation process, on stipulation of the parties, M Supply Company was dismissed as a plaintiff. Only Ronald Schmitt accepted the case evaluation, so the matter proceeded to trial. After a nine-day trial, the jury found the defendants liable for damages totaling $22,000; Joyce Schmitt was responsible for $9,000, Diane Rankin was responsible for

$11,000, and Ronald Schmitt was responsible for $2,000. The jury form indicated that $10,000 of the award was for the plaintiffs' attorney fees, and the remainder for their noneconomic damages. The plaintiffs brought several post-trial motions, including a motion for injunctive relief, which the trial court granted. The plaintiffs then requested case evaluation sanctions, arguing that the verdict was not more favorable to the defendants than the case evaluation because the plaintiffs received an equitable award in addition to monetary damages. Schmitt also moved for case evaluation sanctions, arguing that the adjusted verdict against her was more favorable to her than the case evaluation. The trial court granted the plaintiffs' motion for case evaluation sanctions and denied Schmitt's motion. The trial court partly based its award of case evaluation sanctions on the fact that the plaintiffs had been granted equitable relief. The defendants appealed. In a published opinion, the Court of Appeals held that the trial court erred in basing its award on the order granting injunctive relief. The appellate panel also held that the trial court erred by failing to compare the case evaluation award and jury verdict for each individual plaintiff as against each individual defendant. Finally, the panel held that the defendants did not waive their right to appeal by satisfying the judgment because the plaintiffs obtained the satisfaction of judgment through involuntarily measures, primarily garnishment. Both the plaintiffs and the defendants appeal to the Supreme Court.

Wednesday, November 15
Morning Session Only

PEOPLE v CARTER (case no. 129614)
Prosecuting attorney: T. Lynn Hopkins/(616) 632-6710
Attorney for defendant William Jermichael Carter: Carole M. Stanyar/(313) 963-7222
Trial court: Kent County Circuit Court
At issue: In sentencing criminal defendants, trial courts use statutory "offense variables," which assign a number of points based on various factors in the crime; the number of points is used to determine the length of the sentence. In this case, OV 3 (physical injury to a victim) was misscored at 100 points, resulting in a higher-than-warranted assessment of the range within which the defendant's minimum sentence should fall. The trial court denied the defendant's motion for relief from judgment, which was filed more than four years later, stating that it would impose the same sentence on resentencing. Is the defendant entitled to resentencing? Does the Michigan Supreme Court's statement in *People v Francisco*, 474 Mich 82, 89, n 8 (2006), that resentencing is not required where the trial court clearly indicates that it would have imposed the same sentence regardless of a scoring error, apply to situations where the trial court reaches this conclusion after the original sentencing proceeding?
Background: On February 26, 1999, a Chevy Blazer sped through a red light and broadsided the victim's Ford Explorer, killing her instantly. Three witnesses testified that William Carter was driving the Blazer. Carter was convicted by a jury of second-degree murder and driving with a suspended license. The trial court assessed Carter's prior record variables and offense variables, scoring OV 3 (physical injury to a victim) at 100 points. The trial court did so despite the fact that OV 3 permits 100 points to be scored only "if death results from the commission of a crime and homicide is not the sentencing offense." After adding up the prior record variable and offense variable scores, the court determined that Carter's minimum sentence should fall within the range of 270 to 450 months, or life. The trial court then sentenced Carter to a minimum of 24 years (or 288 months) and a maximum of 45 years in prison for the second-degree murder

conviction, and time served for the driving with a suspended license conviction. The Court of Appeals affirmed Carter's convictions, and the Supreme Court denied leave to appeal. In 2003, Carter filed a motion for relief from judgment. He objected that OV 3 had been misscored and that his guidelines were not properly calculated. Carter argued that his guidelines should have been determined to require a minimum sentence of 180 months to 300 months, or life, and that he was entitled to be resentenced. The trial court denied Carter's motion for relief from judgment. The judge stated that, even if OV 3 had been scored as Carter argues it should have been, he would have imposed the same sentence. The Court of Appeals denied Carter's application for leave to appeal. Carter appeals to the Supreme Court.

MUCI v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (case no. 129388)

Attorney for plaintiff Anila Muci: Thomas N. Economy/(248) 569-4646

Attorney for defendant State Farm Mutual Automobile Insurance Company: James G. Gross/(313) 963-8200

Attorney for amicus curiae Michigan Defense Trial Counsel: Raymond W. Morganti/(248) 357-1400

Attorney for amicus curiae Michigan Trial Lawyers Association: Larry W. Bennett/(248) 457-7037

Trial court: Wayne County Circuit Court

At issue: The plaintiff sued her no-fault insurance company, seeking personal injury protection benefits for an injury sustained in an automobile accident. After filing this lawsuit, the plaintiff refused to be examined by a physician of the defendant's choice unless certain conditions were placed on the examination. The trial court agreed, and entered an order allowing the plaintiff's attorney to be present, allowing the examinations to be videotaped, and precluding the plaintiff from providing the medical examiners with an oral account of the accident or a medical history. May a court impose such conditions on a medical examination?

Background: Anila Muci sued her no-fault insurance company, State Farm Mutual Automobile Insurance Company, claiming that she was seriously injured in an automobile accident and that State Farm was unreasonably refusing to pay personal injury protection benefits. The insurance company asked Muci to attend independent medical examinations, but she refused unless State Farm agreed to various conditions, including that her attorney be allowed to attend, that Muci not be required to provide an oral history of the accident or a medical history, and that the examination be videotaped. State Farm refused, taking the position that MCL 500.3151 of the no-fault act did not permit the imposition of conditions on the medical examinations. MCL 500.3151 states, in part, that "[w]hen the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians." Muci argued that a discovery rule, Michigan Court Rule (MCR) 2.311, permits a trial court to impose conditions on medical examinations, and that the conditions Muci sought to impose were reasonable and did not prejudice the insurance company. The trial court entered an order allowing the insurance company to schedule the medical examinations, but imposing the conditions requested by Muci. State Farm appealed, and the Court of Appeals affirmed in a published, divided opinion. The majority concluded that MCR 2.311 permitted the trial court to impose conditions on a medical examination taken under the discovery rules. The dissenting judge concluded that State Farm had

a right, under MCL 500.3151, to the requested medical examinations and that additional conditions could not be imposed by the trial court. State Farm appeals.

NICKE v MILLER, et al. (case no. 130666)
Attorney for plaintiff Deborah Sue Nicke: Robert M. Sosin/(248) 642-3200
Attorney for defendants Kenneth Michael Miller, Automotive Rentals, Inc., High Voltage Maintenance Corporation, and Emerson Electric Company: Kevin L. Moffatt/(586) 979-6500
Trial court: Wayne County Circuit Court
At issue: To bring an action for noneconomic tort damages under the no-fault insurance act, MCL 500.3135(1), a plaintiff must establish a "serious impairment of body function." In this case, the trial court found that the plaintiff failed to establish that she suffered a serious impairment of body function. The Court of Appeals agreed, but remanded the case to the trial court, so that court could determine whether plaintiff suffered a "temporary serious impairment." Did the Court of Appeals err?
Background: Deborah Sue Nicke's truck was rear-ended by Kenneth Miller's car and then struck by Miller's car a second time, after another vehicle hit Miller's. Nicke sued Miller and others for non-economic losses under Michigan's no-fault insurance act, claiming that she suffered a serious impairment of body function. The act defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). In this case, the trial court concluded that Nicke did not suffer a serious impairment of body function. The judge characterized the accident as a "relatively small incident" in Nicke's life that did not cause any serious injuries. He granted the defendants' motion for summary disposition and dismissed Nicke's complaint. Nicke appealed to the Court of Appeals. In an unpublished per curiam opinion, the Court of Appeals reversed the trial court and remanded the case for further proceedings. The Court of Appeals agreed with the trial court that Nicke did not suffer a permanent serious impairment of body function, noting that Nicke failed to establish that her general ability to lead her normal life was affected by any injuries sustained in the accident. But the appeals court also concluded that Nicke underwent significant surgeries after the accident, and stated that the trial court could not dismiss her case without first considering the possibility that Nicke suffered a "temporary serious impairment" of body function. The Court of Appeals directed the trial court to explore that issue on remand. The defendants appeal.

SAFFIAN v SIMMONS (case no. 129263)
Attorney for plaintiff Kim Saffian: Aaron J. Gauthier/(231) 627-2500
Attorney for defendant Robert R. Simmons, D.D.S.: Scott R. Eckhold/(989) 732-7536
Trial court: Cheboygan County Circuit Court
At issue: Under Michigan law, a medical malpractice complaint must be accompanied by an affidavit of merit. In this medical malpractice case, the trial court entered a default against the defendant dentist for his failure to timely answer the plaintiff's complaint. The default was set aside when the defendant provided an excuse, but was later reinstated because of doubts about the truth of the excuse. But the court also determined that the plaintiff's affidavit of merit was defective. Was the affidavit of merit filed with the complaint sufficient? If not, did the defendant have to answer the complaint? Should the default be set aside and an evidentiary hearing be held concerning the defendant's possible fabrication?

Background: In this dental malpractice case, defendant Robert Simmons, D.D.S., was defaulted for failure to timely answer plaintiff Kim Saffian's complaint. The default was set aside after Simmons explained that the failure to answer was due to a clerical or mechanical error in faxing the complaint to his insurer. But Saffian later showed the trial court that there was no record of a long distance telephone call from Simmons' office to the insurer on the date that Simmons allegedly faxed the complaint. The trial judge reinstated the default against Simmons, despite having also determined that Saffian's affidavit of merit was deficient. Simmons filed a motion for summary disposition, arguing that he could not be defaulted if Saffian's affidavit of merit was defective, because that defect meant that Saffian had never properly commenced the lawsuit. The trial court denied the motion, and the Court of Appeals affirmed in a published opinion. Judge Zahra, concurring in part and dissenting in part, stated that he would remand the case to the trial court for an evidentiary hearing as to whether Simmons had actually fabricated his excuse for failing to answer the complaint. Simmons appeals.

SPITZLEY v SPITZLEY (case no. 130585)
Attorney for plaintiff Michael Francis Spitzley, Personal Representative of the Estate of David A. Spitzley: Roberta R. Ballard/(989) 224-6734
Attorney for defendants Thomas P. Spitzley and Kimberly S. Spitzley: Liisa R. Speaker/(517) 321-9770
Trial court: Clinton County Circuit Court
At issue: At issue here is the propriety of attorney fees and costs awarded to the plaintiff against the defendants. Did the Michigan authority that the defendants identified in the trial court support their position? Did the non-Michigan authority on which the defendants relied present a good-faith argument for the extension, modification, or reversal of existing law? Did the trial court properly award sanctions against the defendants?
Background: The underlying case involves a dispute over the ownership of 40 acres of farmland. Michael Spitzley, the personal representative of his father David Spitzley's estate, signed a personal representative's deed selling real estate to Thomas and Kimberly Spitzley. The legal description on that deed included a legal description relating to a small parcel, under one acre, with a house on it. The remainder of the legal description described 40 acres of farmland. Although this 40-acre parcel was included in the deed, it was owned by Michael Spitzley, not by the estate. As personal representative, Michael Spitzley sued Thomas and Kimberly Spitzley, requesting that the personal representative's deed be reformed to exclude reference to the 40 acres of farmland; he also requested damages. The defendants filed a counter-claim asserting breach of contract, breach of fiduciary obligation, and fraud; they requested that the title be clarified and that damages be awarded to them. The defendants supported their claim to the 40 acres of farmland by citing Michigan authorities, non-Michigan authorities, and sections from American Jurisprudence, an encyclopedia of American law. The trial court granted summary disposition to Michael Spitzley, finding that the estate, acting through its personal representative, could not convey real estate that it did not own. The court also granted Spitzley's request for sanctions against the defendants, ruling that the defendants' position was frivolous and unsupported by evidence or Michigan law. The defendants and their attorney were ordered to pay $6,655 in attorney fees. The Court of Appeals affirmed in an unpublished opinion. Because the defendants set forth "claims and defenses that were not grounded in fact or supported by controlling authority," the trial court did not clearly err when it determined that the defendants' position was frivolous, the appellate panel concluded. The defendants appeal.

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC v TOWNSHIP OF MARION (case no. 130698)

Attorney for petitioner Highland-Howell Development Company, LLC: Kathleen McCree Lewis/(313) 568-6577

Attorney for respondent Township of Marion: Neil H. Goodman/(248) 988-5880

Attorney for amicus curiae Michigan Association of Home Builders: Gregory L. McClelland/(517) 482-4890

Attorney for amicus curiae Michigan Chamber of Commerce: John D. Pirich/(517) 484-8282

Attorney for amicus curiae Michigan Townships Association: Craig A. Rolfe/(269) 382-4500

Attorney for amicus curiae State Bar of Michigan Real Property Law Section: David W. Charron/(616) 363-0300

Tribunal: Michigan Tax Tribunal

At issue: The petitioner developer did not appeal a $3 million special assessment for a sewer project that included a trunk line through its 200-acre parcel. It later appealed to the Tax Tribunal when the respondent township informally eliminated the trunk line, but the appeal was rejected as untimely. After the township formally ratified changes in the original project, including elimination of the trunk line, the petitioner timely appealed, but the Tax Tribunal ruled that its earlier decision barred the appeal under res judicata, a legal doctrine that provides that a matter already decided by a court or tribunal cannot be relitigated. The Court of Appeals affirmed based on the legal doctrine of collateral estoppel, which prevents a party to a lawsuit from raising a fact or issue which was already decided against that party in another lawsuit. How may a property owner seek relief from a special assessment for a planned improvement when there is a later change to the plan that materially affects the benefit to the owner's property? Did the Tax Tribunal have jurisdiction to consider the last appeal?

Background: Under the Public Improvement Act, a township may make a public improvement and levy a special assessment by following a process that includes notice, hearing, opportunity to object by property owners, approval of the plan and determination of a special assessment district by resolution, and confirmation of the "special assessment roll." There is then another hearing, preceded by notice, at which objections can be made to the assessment roll. After that hearing, the township board confirms the special assessment roll, amends it, or rejects it. MCL 41.726(3) provides the only appeal process: "After the confirmation of the special assessment roll, all assessments on that assessment roll shall be final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation." Highland-Howell Development Company, LLC owns 200 vacant acres in Marion Township. Highland-Howell did not object or appeal in December 1996 when Marion Township levied a special assessment of $3.25 million for a sanitary sewer project that included a trunk line through the middle of the Highland-Howell's property. But in 1998, after learning that Marion Township had unofficially eliminated the trunk line from the project, Highland-Howell petitioned the Tax Tribunal. The Tax Tribunal dismissed the appeal for lack of jurisdiction because Highland-Howell had not timely appealed from the 1996 special assessment decision. After Marion Township passed a resolution on May 13, 2004 that ratified changes in the sewer plan, including elimination of the trunk line across Highland-Howell's property, the petitioner filed a petition with the Tax Tribunal within 30 days. The Tax Tribunal dismissed that appeal, reasoning that, under the legal doctrine of res judicata, the tribunal's dismissal of the 1998 petition barred Highland-Howell's 2004 petition. In an unpublished opinion, the Court of

Appeals affirmed, but on the basis that the 2004 petition was barred by collateral estoppel, a legal doctrine which prevents a party to litigation from raising an issue or fact that was decided against that party in another lawsuit. Highland-Howell appeals.

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